Office-Supreme Court, U.S.
FILED
FEB 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-945

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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February 9, 1981

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BRIEF FOR RESPONDENT

INTRODUCTION

This is the second petition for a writ of certiorari filed in this case. The first, filed by petitioners' co-defendant Richard Nixon,[1] is still pending. Respondent opposed the earlier petition,[2] partly on the ground that, in denying

[1] *See* Nixon v. Fitzgerald, No. 79-1738, filed May 2, 1980.

[2] Brief for Respondent in No. 79-1738, filed May 6, 1980.

the motions for summary judgment in this case, the District Court clearly applied the correct legal principles as enunciated by the United States Court of Appeals for the District of Columbia Circuit in *Halperin v. Kissinger*, 606 F.2d 1192 (1979).

Subsequently, this Court issued a writ of certiorari in *Halperin*, and that case has now been fully briefed and argued. At this point it is thus apparent, as both Mr. Nixon[3] and Messrs. Harlow and Butterfield[4] recognize, that the most appropriate course is for this Court to hold these petitions until its *Halperin* decision is announced and then grant these petitions and remand this case so that the District Court can apply the principles announced in *Halperin* to the very extensive record[5] in this case, assuming that the principles thus announced are deemed to cover the factual situation present here.

The immunity defenses asserted by petitioners here are substantially the same as those asserted by defendants in *Halperin*, and respondent adopts by reference the arguments in his earlier brief[6] and that of respondent Halperin in opposition to such defenses. However, there are a number of distinctions between this case and

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[3]*See* Petitioner's Response to Respondent's Reply to Motion for Expedited Consideration of the Petition for a Writ of Certiorari in No. 79-1738.

[4]*See* Memorandum for Respondents Alexander Butterfield and Bryce Harlow at 3-4, filed June 24, 1980 in No. 79-1738, and Petition for a Writ of Certiorari in No. 80-945 at 21.

[5]The record includes over 5,000 pages of deposition testimony, several hundred documentary exhibits, voluminous interrogatory answers and responses to requests for admissions, and extensive briefing of the eight summary judgment motions filed by various defendants during the course of the litigation.

[6]Brief for Respondent in No. 79-1738 at 13-16.

Halperin which could conceivably bear upon the Court's resolution of these questions, and respondent thus feels compelled to bring to the Court's attention certain aspects of the record below which appear to have been misapprehended or overlooked in the instant petition.[7]

I.

SUMMARY JUDGMENT WAS PROPERLY DENIED IN THIS CASE BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE OF PETITIONERS' APPROVAL OF AND PARTICIPATION IN ACTIONS TO DEPRIVE RESPONDENT OF HIS EMPLOYMENT IN RETALIATION FOR HIS EXERCISE OF FIRST AMENDMENT RIGHTS.

With virtually no citation to the record for support, petitioners repeatedly assert that respondent lost his job as a result of a bona fide reorganization of the Department of the Air Force and that there is no evidence to indicate that petitioners had a role in any effort to deprive respondent of his employment on account of his Congressional testimony. Thus, petitioners refer to "the complete lack of evidence linking petitioners with the decision to adopt the Air Force reorganization plan" (Pet. at 19) and represent that "[a]fter almost seven years of litigation, and after the close of exhaustive discovery involving countless depositions, Mr. Fitzgerald has been unable to uncover any evidence whatever establishing that petitioners had a part in the decision to

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[7]The fact that respondent's position in the present case is so well supported by the record may have been the factor which caused the Solicitor General, after due consideration (*see* Solicitor General's Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari, filed September 19, 1980, at 2) to decline submitting a petition on behalf of these petitioners.

eliminate his job or the decision not to rehire him." (Pet. at 17.)[8] It is largely this "thin" state of the record, say petitioners, which confirms the need for a summary judgment ruling that will preclude their being forced to go to trial. (Pet. at 19.)

Of course, it is not necessary for respondent to show that petitioners were the only, or even the chief, actors in the plot to injure him. Respondent's complaint alleges a civil conspiracy and charges that various conspirators took different actions at different times to further the injurious conduct. What is required is that respondent establish an "affirmative link" between the injurious conduct and "the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Here, respondent has amassed a very substantial body of evidence from which a jury could quite properly conclude that the supposed "office reorganization" was in fact a pretext for a retaliatory termination of respondent's employment and that petitioners knowingly supported, approved, and furthered that termination effort.

Typically, in conspiracy cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), plaintiffs necessarily prove their case through "documents, [and] circumstantial

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[8] *Accord*: Pet. at 6: "Despite six years of discovery, Mr. Fitzgerald failed to uncover any evidence showing that petitioners had in any way initiated or approved the Air Force reorganization or had initiated any contact with the Air Force or Defense Department regarding the Fitzgerald matter."

evidence and inference." *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971). *Accord: Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979). Here, respondent indeed relies on many contemporaneous documents, circumstantial evidence, and inference, but also on taped conversations, videotapes, and deposition testimony which directly implicate petitioners and others in the conspiracy.

Naturally, petitioners dispute many of respondent's factual assertions and point to other evidence of record which, they contend, supports a different version of the pertinent events. But it is just such "a genuine issue as to any material fact" which, under Federal Rule of Civil Procedure 56(c), precludes the granting of summary judgment, as the District Court here expressly recognized. (Pet. at 2a, 3a, and 4a.) Indeed, even if that rule were repealed and respondent were required to meet the higher standard proposed by petitioners,[9] it is quite clear that the evidence in this record more than meets that test.

A. The Evidence With Respect to Harlow.

1. *Origination of the plan to "RIF" Fitzgerald in retaliation for his First Amendment activity.*

Within days of his November 1968 Congressional testimony concerning cost overruns on the Air Force's C5A transport plane, respondent was told by then-Secretary of the Air Force Harold Brown that he had

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[9]Petitioners suggest that, when presented with a summary judgment motion, the judge should "determine whether the credible evidence uncovered by the discovery process adds up to a substantial showing that the defendants were implicated in the alleged constitutional tort." (Pet. at 18-19.)

made "a damn poor witness." (Fitzgerald Dep. at 323.) Brown then had a memorandum prepared describing three methods "which could result in Mr. Fitzgerald's departure," including the reduction in force ("RIF") method ultimately used to effect his removal. (PX 113[10] at 2-3.) Three days later, on January 9, 1969, Brown met with incoming Secretary of the Air Force Robert Seamans and discussed Fitzgerald for ninety minutes. He told Seamans that "Fitzgerald is of no use to the Air Force" and "is to be discouraged from remaining." (PX 71.) The contemporaneous memorandum of the conversation reports that Brown and Seamans agreed on this plan because of Fitzgerald's "unacceptable" practices of "speaking to the press," discussing Air Force matters with and providing documents to Congressional committee staffs, and generally "volunteering and advocating contrary views to the press and the Congress." (*Id.*)

Following this discussion, which occurred before Secretary Seamans had taken office, Assistant Air Force Secretary Thomas Nielsen kept coming to Seamans with a proposal to "get his office reorganized with an idea that Ernie's job wouldn't be there any more." (PX 94—Robert Seamans' oral history of the Fitzgerald matter, recorded in 1973 and 1974—at 6.)

The plan to get rid of Fitzgerald by means of a reorganization was solidified in May 1969, immediately after the C5A scandal had boiled over again in a series of embarrassing newspaper articles. (PX 94 at 7; PX 118; PX 120; PX 171; PX 172; PX 173; PX 174; April 30 and May 1, 1969 entries in PX 65, Secretary Seamans' daily logs.) In several lengthy meetings, Secretary of Defense Laird

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[10]In this brief, "PX" stands for plaintiff's deposition exhibits and "DX" for defendants' deposition exhibits.

and Dr. Seamans discussed the adverse publicity and the reorganization plan as it related to Fitzgerald's tenure. (PX 65 at April 30, 1969.) Seamans concluded that Fitzgerald had to be removed from the Air Force, partly because of his communications with Congress and partly because of the impact of his Congressional testimony on his relationship with Air Force officials. (PX 94 at 7-8; Seamans Dep. 2-68 to 2-69, 3-177 to 3-182.)

However, by early May, both Seamans and Laird had made commitments to Congress to respect Fitzgerald's rights and to take no adverse action against him, and Laird had given the express assurance that "he is not being fired." (*See, e.g.*, PX 110; PX 111; PX 117; Laird Dep. at 52.) A jury could reasonably infer from this record that Seamans and Laird therefore needed the advice and approval of the White House before dishonoring their public commitments and firing Fitzgerald from the Air Force.

2. *Harlows' advice and approval of the termination plan.*

On May 9, 1969, Secretary Seamans had the first of at least four personal communications with petitioner Harlow concerning the Fitzgerald matter, notwithstanding Secretary Laird's standing rule against such communications (Laird Dep. at 16-18; DX 132) and the well-established and strongly enforced White House procedure for "funneling" communications with the Defense Department through the National Security Council. (Haig Dep. at 6-7, 21.) Seamans related to Harlow the background of the Fitzgerald matter, Fitzgerald's relationship to the C5A, and the testimony he had given about the overruns in November 1968. (Seamans Dep. 2-112 to 2-117.) Harlow was already well aware of many

of these facts in any event, since he had been annoyed by having to share the speaker's platform with Fitzgerald some weeks previously at a Congressional dinner and there having to defend what he took to be Fitzgerald's "attacks" on the President's defense leadership. (Harlow Dep. at 153-59.)

Following the initial telephone call from Seamans, Harlow's aide, Lamar Alexander, also spoke with Seamans, after which Seamans and Harlow met in person on May 15, 1969. (Seamans Dep. at 2-141 to 2-142, 2-172, 3-255.) On this occasion, Harlow was involved in supervising a Presidential meeting with Congressmen but "had to leave the room to talk with the Secretary, because he suggested he wanted to talk to me." (Harlow Dep. at 58.) "Seamans told him [Harlow] he was going to do it [*i.e.*, terminate Fitzgerald's employment] and wanted counsel as to timing and how to proceed." (PX 26A; Wilson Dep. at 35.) In what Seamans has characterized as "advice" from the White House (Seamans Dep. at 2-148), Harlow responded that he understood that the Air Force had "a problem, but this is not the best time to separate Fitzgerald." (PX 94 at 11.)

On the following day (May 16, 1969), Seamans discussed with Laird the reorganization "as it related to Dr. Seamans' conversation with Bryce Harlow at White House." (PX 65 at May 16, 1969.) On May 17, 1969, Seamans and Laird attended a White House meeting with President Nixon, during which meeting Seamans had "a long conversation in which the Fitzgerald issue arose" and President Nixon referred disapprovingly to the "Fitzgerald kind of thing" as "conduct [that] was undesirable in the Executive Branch." (Schlesinger Dep. at 13-14, 20, 24, 31-33, 55, 57-58.)

Criticism of the Executive Branch intensified in June 1969 when Senator Proxmire held hearings on defense spending at which Fitzgerald was a witness, after being temporarily muzzled by the Pentagon. (DX 12; DX 114 at 3-4.) President Nixon was soon advised that "the Administration * * * has not come off well" during these hearings and that "the Pentagon's muzzling for 72 hours of the Air Force civilian who first exposed the C5A overrun was a classic case of poor public relations." (*Id.*) White House aide Tom Huston recommended to the President that "we ought to fight like we are used to power and know how to use it," noting that

> [o]ur opponents will scream bloody murder if we really turn the heat on them, but they will know we mean business, that we're not soft, and that they cannot expect to fire away with immunity. (DX 114 at 5.)

Mr. Nixon concurred. In June 1969, he ordered John Ehrlichman to have Huston and Patrick Buchanan "work with defense and Congress to stir up some activity" and requested that Laird and Harlow should "read and note" the criticisms. (*Id.*; DX 115.)

3. Harlow's role in overcoming opposition to the termination plan.

On November 4, 1969, the Air Force announced the planned termination of Fitzgerald effective January 5, 1970. (PX 131.) Seamans immediately called Harlow at the White House again to inform him of Fitzgerald's firing. (PX 66 at November 4, 1969 entry; Seamans Dep. at 2-203 to 2-204.) Following his conversation with Harlow, Seamans personally visited and called various members of Congress and dispatched his aides Spencer Schedler and Colonel Pewitt to perform the same mission, stating that Fitzgerald had become "a real

problem and a *persona non grata*," that he was not a team player, and that

> [a]fter his revelations concerning the C-5A the Secretary's office ran a review for themselves and *early in summer knew where they stood.* [Memorandum from the files of Cong. Gerald Ford (November 11, 1969) (Attachment D to Respondent's Summary Judgment Opposition); PX 66 at November 10, 1969 (showing telephone call from Seamans to Frank Meyer, Administrative Assistant to Cong. Gerald Ford) (emphasis added).]

The timing of these events gives rise to the reasonable inference that in their November 4, 1969 telephone conversation, Harlow and Seamans also discussed what story the Air Force would tell Congress to justify Fitzgerald's removal.

After the announcement of the proposed firing was made public, White House ombudsman Clark Mollenhoff began investigating the matter and concluded that the termination of Fitzgerald was totally unjustified. (Mollenhoff Dep. at 73-76, 79-83, 88-89; PX 25.) He thus prepared a November 17, 1969 memorandum for President Nixon urging that the President cancel the termination order and gave the memorandum to Harlow for delivery to the President. (DX 40.) Although he had already discussed Fitzgerald's termination three times with Seamans, Harlow falsely denied to Mollenhoff any prior knowledge of the matter. (Mollenhoff Dep. at 58-60.) However, Harlow subsequently informed him that he had delivered the memorandum to Mr. Nixon and discussed it with him. (Mollenhoff Dep. at 49, 112-113, 186; *accord*: President's Daily Diary at November 17, 1969.)

While Harlow professes no recollection of any such conversation with Mr. Nixon, the record provides ample evidence of their discussion. Thus, President Nixon

expressly recalled that "Bryce was all for canning him" (DX 172 at 4) and even suggested in 1973 that Ronald Ziegler refer Mollenhoff to Harlow because "the President has some recollection that Harlow has some information on it." (*Id.* at 5.) In addition, in discussing the case with John Ehrlichman, Mr. Nixon specifically recalled that "Harlow had raised it with me I think," to which Ehrlichman replied that "Harlow particularly talked to you about it." (PX 140 at 10.) Far from establishing petitioners' assertion that Harlow did *not* have any role with respect to Fitzgerald's termination, the record strongly supports Ziegler's statement to Mr. Nixon that "when we came in it was all Harlow's ball game * * *." (DX 172 at 4.)

This conclusion is strongly buttressed by President Nixon's recorded 1973 remarks, after a press conference at which a specific question about Fitzgerald was raised:

> I said get rid of that son of a bitch. You know, "cause he is, he's been doing" this two or three times. So Seamans, who isn't much of a sandbagger uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it. (PX 140 at 2.)
>
> * * * * *
>
> I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and *Mr. Seamans must have been talking to someone who had discussed the matter with me.* (PX 19 at 9.) (emphasis added.)

The record shows that the person Seamans had been talking to was petitioner Harlow, who "was all for canning him" (DX 172 at 4), and this advice to President Nixon undoubtedly played a part in the presidential decision to terminate plaintiff's employment.

B. The Evidence With Respect to Butterfield.

Petitioner Butterfield's involvement with Fitzgerald began in about May of 1969 when he gratuitously called John Ehrlichman's attention to the alleged plans of Fitzgerald "to blow the whistle" on shoddy purchasing practices. (DX 135.) "[F]ortunately for us," said Butterfield, someone had tipped the Administration off. (*Id.*)

Subsequently, in approximately December 1969, White House Chief of Staff H. R. Haldeman chaired a meeting of certain White House aides at which he, Haldeman, gave a derogatory resume of the Fitzgerald case. (Butterfield Dep. at 157-61.) Butterfield attended the meeting and later testified:

> As I recall what I heard, Mr. Fitzgerald did not go through channels, which I would consider—did not go through channels and instead went on his own to the Congress, to the Hill, to report some cost overruns. (*Id.* at 158.)

Butterfield also knew about the Fitzgerald matter from what he read in the papers from time to time and was therefore well aware that Fitzgerald had given information to Congress about cost overruns. (*Id.*)

Following the meeting, Butterfield, who was normally just "a paper flow guy" (Ziegler Dep. at 100; Haldeman Dep. I at 48), took it upon himself to assert his substantive views on the Fitzgerald matter, based upon his "strong lines of communication and contact" with the Air Force. (Haldeman Dep. I at 199-201.) Knowing that his remarks would have a bearing on "whether or not he [Fitzgerald] would be put back on the Federal payroll or whatever" (Butterfield Dep. at 146), Butterfield telephoned his remarks to Haldeman at the Western White House:

> Let's let him bleed for awhile. He is 100% disloyal—not without expertise in his field, but nonetheless 100% idsloyal [sic].
>
> * * * * *
>
> If there is still some plan to pick up Fitzgerald and bring him into the Federal Government structure, we should certainly not do it right away. I say this for two reasons:
>
> 1. It would be an admission of error on *our* part.
> 2. Senator Proxmire and others who have made a hero of Fitzgerald deserve first choice. Let's wait awhile and see if they pick him up.
>
> (DX 166.) (emphasis added.)

At the time of these gratuitous remarks, there was no pending "inquiry" from the White House press office, as suggested by petitioners. (Pet. at 4.) In fact, contrary to Butterfield's assertion (Pet. at 3) that he was "typically required to express his recommendations to the President and the President's principal assistants on many matters of White House concern," Haldeman, the intended recipient of the remarks, has denied that he was involved in or had anything substantively to do with the preparation of positions for Presidential press conferences. (Affidavit of H. R. Haldeman ¶ 3, August 25, 1977.) The person who had this responsibility was Patrick Buchanan, to whom Butterfield admittedly did not send a copy of his memorandum about Fitzgerald. (Butterfield Dep. at 197.)

Just in case his oral remarks did not have their obviously intended effect, Butterfield elaborated upon them and reduced them to writing in his January 20, 1970 "let him bleed" memorandum. (PX 12.) He sent the memorandum not only to Haldeman, but also to Ehrlich-

man, Kissinger, Herb Klein, Chuck Colson, Lyn Nofziger, Jeb Magruder, and Ron Ziegler. (*Id.*, Magruder copy; DX 156, Kissinger copy.) This time he stated that Fitzgerald "*must* be given very low marks in loyalty" and reminded the readers that, "after all, loyalty is the name of the game." (PX 12 at 1, emphasis in original.) He also added the advice that, "we should let him bleed, for a while at least."[11] (*Id.* at 2.) Doing otherwise would admit "earlier wrong-doing on our part." (*Id.*)

Butterfield is under oath as having intended by the phrase, "let him bleed":

> Let him cry, let him suffer, for at least awhile. And that is precisely what I did mean. (Butterfield Dep. at 143.)

His intent was perfectly consistent with his attitude towards a "rat" (Attachment G to Respondent's Summary Judgment Opposition) who "took it upon himself to decide * * * that I am doing something wrong and goes to Congress with it, I think that fellow ought to be fired * * *." (Attachment H to Respondent's Summary Judgment Opposition.)

Thus, Butterfield communicated not once, but at least three times, to be certain that his totally unverified accusations against Fitzgerald, together with a recommendation that the Administration let him suffer, got broad circulation within the White House. By these acts, Butterfield joined the conspiracy to retaliate against Fitzgerald for his communications to Congress, even to the point of urging that a person who engages in such communications "ought to be fired." (*Id.*)

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[11]Significantly, the petitioners' description of this memorandum (Pet. at 5) omits any mention of this malicious language.

II.

PETITIONERS' ARGUMENTS FOR A "SUPERVISORY" ADMONITION CONCERNING QUALIFIED IMMUNITY ARE NOT WELL TAKEN.

A. The District Court Here Did Not Misapply Butz v. Economou and Using This Case to Issue a "Supervisory Ruling" for Other Lower Courts Is Not Appropriate.

In Part III of their petition, petitioners quote this Court's conclusion that a principle of qualified immunity for constitutional violations is workable since "insubstantial lawsuits can be quickly terminated by federal courts * * * on a properly supported motion for summary judgment based on the defense of immunity." *Butz v. Economou*, 438 U.S. 478, 507-508 (1978). Petitioners contend that this approach has proven ineffectual since lower federal courts, including the District Court in this case, have treated a plaintiff's mere allegation of malice as sufficient to bar summary judgment. (Pet. at 15-16.) Thus, petitioners maintain that this Court should exercise its "supervisory powers over the federal judicial system" in order to "reemphasize the need for appropriate use of summary judgment disposition of qualified immunity claims" and "clarify its rule in *Butz* for the benefit of the lower courts." (Pet. at 17, 20.) Petitioners' arguments for issuing such a supervisory ruling in this case are not well taken.

First, what other courts have done with other cases is irrelevant to this case. If other district courts have misapplied the *Butz* standard, then those errors should be corrected through appeal and, if appropriate, certiorari in *those* cases. The petition here, however, gives reason to doubt that mistakes of the sort petitioners postulate have occurred with any frequency. As evidence that lower federal courts have denied summary judgment on a mere

allegation of malice, petitioners cite *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), *appeal dismissed in part and stayed in part*, 624 F.2d 3 (2d Cir. 1980) and *Dellums v. Powell*, 490 F. Supp. 70 (D.D.C. 1980). (Pet. at 16.) Yet, neither case involved a ruling on summary judgment. Rather, *Clark* concerned a motion to dismiss the complaint, and *Dellums* involved a motion for judgment on the pleadings.

Moreover, petitioners' apparent misapprehension of federal civil procedure is further confirmed by their mischaracterization of the District Court's actions in this case. In the Statement of the Case portion of their petition, petitioners assert that the District Court refused to rule on their claim of qualified immunity. (Pet. at 6-7.) This is not so. The matter of qualified immunity was briefed extensively to the District Court, and the Court expressly ruled that the existence of genuine issues of fact precluded the granting of summary judgment on this defense.[12] In short, the District Court did not "refuse to rule" on the qualified immunity defense. Rather, it ruled against petitioners on this defense because they had failed

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[12]The District Court's order denying summary judgment states in pertinent part:

> In order to establish qualified immunity, each defendant must show that he was acting "within the outer perimeters" of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. Butz v. Economou, supra; Halperin v. Kissinger, supra. *See* Wood v. Strickland, 420 U.S. 308 (1975). *Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct.* (Pet. at 2a-3a.) (emphasis added.)

to present a "properly supported motion for summary judgment."

Finally, petitioners assert that "the inference is inescapable" that, but for the Court of Appeals precedent in *Halperin v. Kissinger*, the District Court in this case would have granted petitioners' motion for summary judgment. (Pet. at 17.) Apart from its deficiency as total speculation, this assertion is highly improbable. Language in the District Court's opinion[13] strongly suggests that it found ample evidence in the record for submission of this case to the jury.

B. Petitioners Have Not, as They Suggest, Established Their Qualified Immunity Defense as a Matter of Law.

Petitioners argue that the evidence before this Court warrants a ruling that "*as a matter of law* petitioners ought not, on this type of record, be forced to put any issue here to a trial." (Pet. at 19, emphasis in original.) In

[13]Thus, Judge Gesell's order denying summary judgment refers to "White House prevarications and duplicity," and indicates that the inclusion of President Nixon as a defendant is "clearly justified" on the present record and "active concealment by Harlow can be implied on plaintiff's version of the facts." (Pet. at 9a-10a.)

order to establish their defense of qualified immunity, petitioners have the burden of proving that (a) they were acting within the scope of their employment and the ambit of their lawful discretion, (b) they believed in good faith in the lawfulness of their conduct, and (c) such belief was reasonable. *Butz v. Economou*, 438 U.S. 478, 497-98 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Halperin v. Kissinger*, 606 F.2d 1192, 1209 (D.C. Cir. 1979); *Accord*, Pet. at 11. This, petitioners have utterly failed to do. While the petition is replete with conclusory assertions that petitioners were "senior advisors" to the President (Pet. at 3, 7, 12) who were "daily called upon to 'second guess' decisions of executive departments" (Pet. at 13) and who "every day deal[t] with matters of critical importance to the nation" (Pet. at 14), the record plainly shows that, as regards their actions concerning Fitzgerald's employment, they acted unreasonably, in bad faith, and outside the scope of their regular employment.

1. The evidence with respect to Harlow.

The record is studded with testimony establishing that petitioner Harlow's multiple communications with the Defense Department and others about "canning" Fitzgerald were outside the scope of his employment. He volunteered it himself at his deposition, admitting that "Mr. Fitzgerald was not in my wicket. I was charged with other matters." (Harlow Dep. at 181.) Dr. Schlesinger testified, "I would have been surprised if Mr. Harlow had brought this up. * * * [I]t was not his area of concern. * * * I doubt very much it is the sort of subject that Harlow would raise." (Schlesinger Dep. at 28.)

Moreover, General Haig testified that the White House required that communications with the Defense Depart-

ment be funneled through the National Security Council and that "this rule" applied "even more importantly" to communications with the service secretaries. (Haig Dep. at 21-22; Butterfield Dep. at 121.) Yet Haig was never apprised of Harlow's repeated communications with the Air Force regarding the Fitzgerald case. (*Id.*)

Even Harlow's own deputy, William E. Timmons, testified that,

> I would consider it highly unusual for him [Harlow] to have direct communication on an issue like this.
>
> Q: That is direct communication with the Department of Defense or the Department of the Air Force?
>
> A: I would think that would be unusual. If it were a major legislative issue, I would think that not unusual.
>
> Q: But an issue such as Mr. Fitzgerald's employment, it would be highly unusual for him to have direct communication with the Department of the Air Force or the Department of Defense?
>
> A: I would think so. * * * (Timmons Dep. at 49-50.)

Why then did Harlow have a half dozen separate communications with Seamans and Assistant Defense Secretary Packard regarding Fitzgerald's employment, and why did he, and not the National Security Council, act as a conduit for Packard's "vehement protest" concerning possible reinstatement of Fitzgerald? (PX 141.) Mr. Nixon supplied the answer in his second deposition, testifying that Harlow would take the Defense Department's position because of his long association with Defense while on the staff of the Armed Services Committee. (Nixon Dep. II at 7, 33-34.)

Thus, Harlow's motive for passing beyond his normal role, urging the President to "can" Fitzgerald, and apparently coaching the whole "ball game" (in Mr. Ziegler's words) (DX 172 at 4), was personal. But such personal animus is completely inconsistent with the good faith and reasonable belief required for qualified immunity, just as Harlow's actual communications outside of channels negate any claim that he was acting within the scope of his employment. Nor, if Harlow were acting in good faith, is there any credible explanation for his concealing from Mollenhoff his own prior knowledge of the firing and his communications with Secretary Seamans about it. (Mollenhoff Dep. at 58-60.)

In short, Harlow was not "required, by the legal obligations of his * * * position to exercise discretion * * *" in the Fitzgerald matter. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Rather, he involved himself out of personal malice, at his own initiative and the initiative of his co-conspirators. The present record strongly supports this conclusion and clearly precluded summary judgment on petitioner Harlow's immunity defense.

2. *The evidence with respect to Butterfield.*

The petition gives the impression that petitioner Butterfield's position at the White House required that he routinely make substantive recommendations concerning the formulation of administration policy. (Pet. at 3, 4.) However, Ziegler described Butterfield as a mere "paper flow guy" and testified under cross-examination by Butterfield's own counsel that, contrary to the impression left by the petition (Pet. at 4), "I don't believe Butterfield would have been an individual that would have prepared substantive matters for a press conference." (Ziegler Dep. at 105-106.) General Haig also

recalled Butterfield's role as "highly administrative" and testified that for Butterfield to have sent the National Security Council a memorandum concerning "substantive matters" would have been an exception to the rule. (Haig Dep. at 36.)

As for petitioners' assertion that Butterfield would regularly advise Haldeman on a variety of substantive subjects, a jury would certainly be entitled to compare that assertion with what Butterfield told a reporter in 1973 before this litigation commenced: "I wasn't the kind of fellow that would normally advise Haldeman on anything—it wasn't my role at all." (Attachment H to Respondent's Summary Judgment Opposition.) Indeed, said Butterfield, "I wrote one other memo, similar to that, out of my field entirely. Haldeman should have said, this is none of your business." (*Id.* at 2.)

Finally, the contention that it was Butterfield's proper role to prepare memoranda like his "let him bleed" memorandum of January 1970 (PX 12) collides head-on with President Nixon's own testimony that he did *not* want Butterfield preparing memoranda of this sort:

> And I would not have wanted that attitude in the matter to get any further than it did, which apparently it did to Mr. Haldeman, who was Mr. Butterfield's immediate superior. (Nixon Dep. I at 332.)

Of course, the memorandum *did* get further than Mr. Haldeman; it was circulated to more than half a dozen persons in the White House, as well as the National Security Council. (PX 12; PX 237.)

To rule on this record that it was within the scope of Butterfield's employment to circulate vicious personal remarks and a recommendation that the Administration

should let a concededly "top-notch cost expert" "bleed" is to license every mean and petty impulse of those temporarily in power. President Nixon himself has testified that he did not want this kind of "advice," and it was surely not necessary to the effective functioning of the government.

III.

NOR IS THE DEFENSE OF ABSOLUTE IMMUNITY SUPPORTED BY THIS RECORD, EVEN IF THIS COURT WERE INCLINED TO GRANT SUCH IMMUNITY DERIVATIVELY TO ALL PERSONS "CARRYING OUT THE ORDERS OF THE PRESIDENT."

Petitioners argue that their employment as members of the White House staff placed them in one of those "exceptional situations" where "absolute immunity is essential for the conduct of the public business" under *Butz v. Economou*. (Pet. at 10.) The arguments against an absolute immunity for Presidential aides are well articulated in the briefs filed by respondent Halperin in his case and need not be repeated here. However, some further difficulties presented by the absolute immunity claim asserted in this case deserve brief comment.

In the argument before this Court in *Halperin*, the Solicitor General urged that the President should be accorded an absolute immunity from civil damage actions and that such immunity should be "derivatively" extended to those officials "carrying out the President's orders." But, of course, a vast array of public officials and others may be said to be engaged in carrying out and implementing the numerous executive orders, directives, regulations and other policies which emanate from the President on virtually a daily basis. To this respondent it appeared that the Solicitor General did not have a satisfactory answer to the vexing question of how far

down the chain of command such derivative immunity can legitimately extend. But without a clear answer, a rule of absolute immunity for those implementing Presidential orders and policies essentially immunizes the entire Executive Branch from civil liability?[14]

However, even if this Court should be disposed to accept some form of derivative defense for those carrying out Presidential directives, neither petitioner here has demonstrated on this record his entitlement to invoke such protection. First, as noted above, neither petitioner has properly established that the actions upon which liability is predicated were actually within the scope of his responsibilities as a government official; indeed, the record strongly indicates the contrary in both cases. Second, neither petitioner claims to have received a Presidential order to act in this matter; on the contrary, both deny any consultation with the President concerning this case. Moreover, unlike *Halperin*, which involved wiretaps allegedly designed to prevent the leaking of highly classified information, this case involves no element of national security. Petitioners can therefore take no solace or protection from the general subject matter of the Fitzgerald affair, even if national security or foreign policy subject matter might alone vest Presidential advisors with absolute immunity.

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[14]The proposed "derivative" immunity also raises the serious question of whether this Court wishes to decree protection for all government officials who can contend, and possibly prove, that they were "simply following orders." At Nuremberg, this nation emphatically rejected that line of defense, even in the case of military officers carrying out orders in wartime, and respondent doubts that its resurrection in the instant context would truly benefit the government or its citizens.

In short, this record, in its present state, fails to offer any reasonable demarcation line for cutting off absolute immunity or confining it to those directly implementing express Presidential instructions. Only if such immunity extends, without regard to subject matter or the existence of Presidential orders, to all those who work in the White House, or indeed the Executive Branch,[16] could it be extended to petitioners on summary judgment here.[17] But an immunity of that breadth is surely unnecessary to the conduct of any legitimate public business and thus wholly unwarranted.

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[15] If, on this record, petitioners Harlow and Butterfield are entitled to absolute immunity for their roles in the Fitzgerald matter, why should such immunity not be equally available to Secretary Seamans, Secretary Laird, military aide Col. Pewitt, Haldeman, Ehrlichman, Ziegler, and the several dozen other officials who wrote memoranda, held meetings, and took actions in the matter?

[16] Petitioners represent that respondent's "claims against Air Force officials have failed." (Pet. at 3.) However, those claims did not fail on the merits but were simply held barred by the statute of limitations. *See* Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), *affirmed in part and reversed in part*, 553 F.2d 220 (D.C. Cir. 1977).

CONCLUSION

For the reasons stated above, and in the brief of respondent Halperin, this Court should adopt the fair and judicious immunity rule articulated by the United States Court of Appeals for the District of Columbia Circuit in *Halperin* and should then grant the petitions here and in No. 79-738 (*Nixon v. Fitzgerald*), remanding this case for further proceedings consistent with this Court's *Halperin* opinion.

Respectfully submitted,

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February 9, 1981